IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	**No. 23226-3-III**
Respondent,	)	
	)	**Division Three**
v.	)	
	)	
CHRISTINA A. GERMANY,	)	**UNPUBLISHED OPINION**
	)	
Appellant.	)	
	)	

BROWN, J.—At the time of these events, Christina A. Germany (formerly Thornblade) and Larry Thornblade, Sr. were married with one child. Mr. Thornblade took the child to Ellensburg, allegedly with Ms. Germany's knowledge. Months later, Ms. Germany and two friends drove to Ellensburg to retrieve the child. Two altercations occurred between the child's grandmother and Ms. Germany. Ms. Germany was convicted of first degree custodial interference and two counts of second degree assault. On appeal, Ms. Germany claims error in selective prosecution, ineffective assistance of counsel, instructions, insufficient assault evidence, and prosecutorial misconduct. Finding no error, we affirm.

FACTS

On July 5, 2003, Mr. Thornblade and the couple's infant son moved to Ellensburg where Mr. Thornblade's mother lived. Mr. Thornblade related he left because of Ms. Germany's drug problem and with her knowledge he was taking the child. About eight months later, Ms. Germany and her friends, Tracey VanKnowe and Marvin "Ken" Walker drove to Ellensburg to retrieve the child.

The three located the child with his grandmother, Terri Covey, at a Safeway. Ms. Germany approached Ms. Covey, screaming "bitch." Trial Report of Proceedings (TRP) Volume IV at 16. Ms. Germany then shoved Ms. Covey and told Ms. VanKnowe to "take him." TRP Vol. IV at 17. Ms. VanKnowe took the infant from Ms. Covey's shopping cart and left. Ms. Germany grabbed Ms. Covey to prevent her from following and pushed her into a grocery display.

Ms. VanKnowe took the child to the parking lot where Mr. Walker was waiting. Ms. VanKnowe and the child entered the car. Ms. Covey unsuccessfully tried several times to open the doors. She then ran back to the front of the car to stop it from leaving. Ms. Covey put her hands on the hood and her legs against the bumper. Mr. Walker edged the car forward, against Ms. Covey's legs, forcing her to move backwards. Ms. Covey testified Mr. Walker drove the car against her legs hard enough that she feared he would break her legs so she moved away. The car then drove away. Her legs were bruised. Additional relevant facts are presented in the analysis below.

Ms. Germany, Ms. VanKnowe and Mr. Walker were charged with first degree custodial interference, one count of second degree assault for the incident inside Safeway, one count of second degree assault for the vehicle incident, and conspiracy to commit first degree custodial interference. The court joined the three cases for trial.

The State filed a motion to exclude evidence relating to Mr. Thornblades' drug use. The court partially granted the request, instructing the attorneys "to keep this matter in context and understand there are allegation [sic] of drug use on both sides and a little of that is going to probably come in." TRP Vol. I at 1. Ms. Germany successfully moved to exclude evidence of her sexual orientation.

During an investigating officer's direct testimony, the following occurred:

> PROSECUTOR: What did she relay to you?
> OFFICER: The first time we spoke — let's [sic] me flip over that page. She had told me that the baby's mother —Larry Thornblade is the infant, his mother Christine Thornblade, she told me is her girlfriend.
> DEFENSE COUNSEL: Objection. Your Honor. I ask for a curative instruction.
> THE COURT: Overruled. Her friend. Go ahead.

TRP Vol. II at 55. Another officer was cross-examined by defense counsel about Ms. Covey's drug allegations against Ms. Germany.

When the State rested, Ms. Germany unsuccessfully sought dismissal of all charges for evidence insufficiency.

The court defined assault in Jury Instruction No. 10, partly instructing, "An assault is an intentional touching or striking of another person that is harmful or

offensive regardless of whether any physical injury is done to the person. A touching or striking would offend an ordinary person who is not unduly sensitive." Clerk's Papers (CP) at 76. The court gave Jury Instruction No. 11, the second degree assault elements instruction proposed by the defense based on the use of a deadly weapon.

During closing argument, the prosecutor referred to the evidence and argued "[t]his crime is committed when you use a deadly weapon and of which a car you heard the instructions a car is a deadly weapon." TRP Vol. IV at 158. Later, he argued "Not one person came here on the defense for [Ms. Germany] as [she] proposed to you in opening." TRP Vol. IV at 187. Defense counsel objected and pointed out Ms. Germany's sister was in the courtroom. The court overruled the objection, noting she was not called as a witness.

The jury found Ms. Germany guilty of first degree custodial interference, second degree assault (principal - Safeway incident) and second degree assault (accomplice - automobile incident). Ms. Germany appealed.

ANALYSIS

A. Selective Prosecution

Ms. Germany contends the prosecutor selectively chose to prosecute her over Mr. Thornblade even though he committed the same offense. However, Ms. Germany did not raise the issue of selective prosecution below.

Generally, an issue cannot be raised for the first time on appeal unless it is a

"manifest error affecting a constitutional right." RAP 2.5(a). This exception to the general rule does not automatically mandate review whenever a criminal defendant identifies some constitutional issue not raised below. *State v. McFarland*, 127 Wn.2d 322, 333-34, 899 P.2d 1251 (1995). Appellant must show the alleged error is "manifest" by demonstrating actual prejudice. *Id.* at 333. We have previously held an error based on selective prosecution is not manifest when no record exists to determine prejudice. *See State v. Munguia*, 107 Wn. App. 328, 340, 26 P.3d 1017 (2001) (the lack of discovery or an evidentiary hearing hinders a determination of prejudice). Thus, "[t]he place to initiate a claim of selective prosecution is in the trial court." *Id.* Therefore, Ms. Germany's failure to argue selective prosecution below precludes review.

B. Assistance of Counsel

The issue is whether Ms. Germany received ineffective assistance of counsel, considering her trial counsel's failure to raise the selective prosecution issue.

Ineffective assistance of counsel claims must show "(1) defense counsel's representation was deficient, i.e., it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) defense counsel's deficient representation prejudiced the defendant, i.e., there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different." *McFarland*, 127 Wn.2d at 334-35 (citing *State v. Thomas*, 109 Wn.2d

222, 225-26, 743 P.2d 816 (1987) (applying the two-prong test in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). We presume counsel's representation was effective after reviewing the record below. *McFarland,* 127 Wn.2d at 335. Ms. Germany "must show in the record the absence of legitimate strategic or tactical reasons supporting the challenged conduct by counsel." *Id.* at 336.

Selective prosecution occurs when a defendant is prosecuted where similarly situated people are not, showing improper motivatation. *Munguia*, 107 Wn. App. at 339 (citing *State v. Judge*, 100 Wn.2d 706, 713, 675 P.2d 219 (1984)). Unjustifiable standards are arbitrary classifications, such as race and religion. *Munguia*, 107 Wn. App. at 340. Ms. Germany suggests no unjustifiable standard and presents no improper motivation or collusion between the Spokane County and Kittitas County prosecuting authorities. Therefore, defense counsel's performance was not deficient.

C. Assault Evidence Sufficiency

Ms. Germany contends insufficient evidence supports the driving related to second degree assault conviction because (1) the car was not used as a deadly weapon, (2) Mr. Walker did not intend to use the car as a deadly weapon, and (3) Ms. Germany was not an accomplice to Mr. Walker's actions. She next contends insufficient evidence supports the grocery store assault conviction because the underlying felony supporting the conviction, custodial interference, was not directed

toward Ms. Covey.

A criminal defendant may challenge evidence sufficiency before trial, at the end of the State's case in chief, at the end of all of the evidence, after the verdict, and on appeal. *State v. Jackson*, 82 Wn. App. 594, 607-08, 918 P.2d 945 (1996). On review we determine whether the evidence is legally sufficient to support the jury's finding. *State v. Clark*, 143 Wn.2d 731, 769, 24 P.3d 1006 (2001).

Our focus is whether, after viewing the evidence most favorably for the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Joy*, 121 Wn.2d 333, 338, 851 P.2d 654 (1993). Substantial evidence must support the crime elements. *State v. Cleman*, 18 Wn. App. 495, 498, 568 P.2d 832 (1977). Substantial evidence is that quantum of evidence necessary to establish circumstances from which the jury could reasonably infer the fact to be proved. *Id*. "All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant." *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

A defendant claiming evidence insufficiency admits the truth of the State's evidence and all reasonable inferences from that evidence. *State v. Myers*, 133 Wn.2d 26, 37, 941 P.2d 1102 (1997). Circumstantial evidence is as reliable as direct evidence. *Myers*, 133 Wn.2d at 38. A fact finder may draw inferences from circumstantial evidence so long as the inferences are rationally related to the proven

fact. *State v. Bencivenga*, 137 Wn.2d 703, 707, 974 P.2d 832 (1999).

To support the second degree assault conviction based on the driving incident, the State must prove beyond a reasonable doubt an intentional assault with a deadly weapon. RCW 9A.36.021(1)(c). A "deadly weapon" includes a vehicle, "which, under the circumstances in which it is used, attempted to be used, or threatened to be used, is readily capable of causing death or substantial bodily harm."[1] RCW 9A.04.110(6). Thus, unlike a firearm, a vehicle is not per se deadly; rather, it is the vehicle's "inherent capacity" and the circumstances under which it is used that determine whether it is a deadly weapon. *State v. Shilling*, 77 Wn. App. 166, 171, 889 P.2d 948 (1995). The circumstances include "'the intent and present ability of the user, the degree of force, the part of the body to which it was applied and the physical injuries inflicted.'" *Id*. (quoting *State v. Sorenson*, 6 Wn. App. 269, 273, 492 P.2d 233 (1972)).

Ms. Germany merely minimizes Mr. Walker's actions and argues contrary inferences for the jury to have drawn. The State need no more than show the vehicle was "readily capable" of causing substantial bodily harm under the particular circumstances. RCW 9A.04.110(6). Taking the evidence most favorably to the State, Ms. Covey was directly in front of the vehicle with her hands on the hood and her knees touching the bumper. The pressure of the vehicle against her legs caused her to fear

[1] Substantial bodily harm is "bodily injury which involves a temporary but substantial disfigurement, or which causes a temporary but substantial loss or impairment of the function of any bodily part or organ, or which causes a fracture of any bodily part." RCW 9A.04.110(4)(b).

Mr. Walker would break her legs if she did not move. Her legs were bruised. Mr. Walker's actions infer his intent. The evidence was sufficient for a reasonable trier of fact to conclude Mr. Walker used the vehicle as a deadly weapon. We next analyze the evidence in support of Ms. Germany's accomplice liability for this count.

A person is guilty as an accomplice if, "with knowledge that it will promote or facilitate the commission of the crime, he (i) solicits, commands, encourages, or requests such other person to commit it; or (ii) aids or agrees to aid such other person in planning or committing it." RCW 9A.08.020(3)(a). To convict as either an accomplice or a principal, the jury need only be convinced that the crime was committed and that the defendant participated in it. *State v. Teal*, 152 Wn.2d 333, 339, 96 P.3d 974 (2004). The intent to facilitate another in the commission of the crime by providing assistance through presence and actions makes an accomplice criminally liable. *State v. Galisia*, 63 Wn. App. 833, 840, 822 P.2d 303 (1992). The State must show the defendant aided in the planning or commission of the crime and had knowledge of the crime. *State v. Berube*, 150 Wn.2d 498, 511, 79 P.3d 1144 (2003).

Viewing the evidence for the State, Ms. Germany planned with Mr. Walker and Ms. VanKnowe to travel to Ellensburg to retrieve her son. After locating the child, and while observing their actions she instructed Ms. VanKnowe and Mr. Walker to take the child, yelling to Mr. Walker "[j]ust get out of here, go." TRP Vol. II at 131. Considering Ms. Covey's position in front of the vehicle, the jury could infer the necessary

knowledge required in RCW 9A.08.020. *State v. Roberts*, 142 Wn.2d 471, 513, 14 P.3d 713 (2000). Ms. Germany's general knowledge that Mr. Walker necessarily would use the vehicle in a potentially deadly manner to facilitate the taking of the child is sufficient to support accomplice liability.

Next, regarding the grocery store assault, second degree assault can be committed when a defendant "with intent to commit a felony" assaults another. RCW 9A.36.021(1)(e). The charging document alleges Ms. Germany, with the intent to commit first degree custodial interference, assaulted Ms. Covey inside Safeway. First degree custodial interference is a felony. RCW 9A.40.060(4).

Ms. Germany argues the felony being committed must be directed at the person being assaulted and Ms. Covey did not have child custody. Ms. Germany does not cite any legal authority to support her position; instead, she cites two cases where the assault and the felony were directed toward the same victim.

In determining statutory meaning, our goal is to carry out the intent of the legislature. *State v. Neher*, 112 Wn.2d 347, 350, 771 P.2d 330 (1989) (citing *State v. Wilbur*, 110 Wn.2d 16, 18, 749 P.2d 1295 (1988)). "If the language is plain and unambiguous, the meaning is derived from the wording of the statute itself." *Neher*, 112 Wn.2d at 350. "When interpreting a criminal statute, a literal and strict interpretation must be given." *State v. Wilson*, 125 Wn.2d 212, 216-17, 883 P.2d 320 (1994).

Here, RCW 9A.36.021(1)(e) plainly states "with intent to commit a felony." The statute is unambiguous. The legislature did not require the felony be directed toward the person assaulted. Accordingly, the evidence of custodial interference and assault is sufficient to support Ms. Germany's second degree assault conviction.

D. Instructions

The issue is whether the court improperly instructed the jury regarding the definition of assault. Ms. Germany contends the court left out the word, "if" in Jury Instruction No. 10, relieving the State of its burden of proof. [2]

In Jury Instruction No. 10, the court instructed the jury:

> An assault is an intentional touching or striking of another person that is harmful or offensive regardless of whether any physical injury is done to the person. A touching or striking would offend an ordinary person who is not unduly sensitive.

CP at 76. However, 11 Washington Pattern Jury Instructions: Criminal 35.50, at 453 (2d ed. 1994) (WPIC) provides: "[A touching] [or] [striking] [or] [cutting] [or] [shooting] is offensive, *if* the [touching] [or] [striking] [or] [cutting] [or] [shooting] would offend an ordinary person who is not unduly sensitive.]]" (Emphasis added.)

Ms. Germany did not object to Jury Instruction No. 10. The assault definition is

[2] Initially, Ms. Germany assigned error to Jury Instruction No. 11, the to-convict instruction for second degree assault. Since she proposed Jury Instruction 11, she concedes the invited error doctrine precludes review. *See State v. Studd*, 137 Wn.2d 533, 546-47, 973 P.2d 1049 (1999) (a defendant who proposes an erroneous instruction without attempting to add a remedial instruction invites the error and may not therefore complain on appeal).

not an element of the crime and therefore must specifically be challenged for error to be preserved. *State v. Daniels*, 87 Wn. App. 149, 156, 940 P.2d 690 (1997). Since Ms. Germany did not challenge this instruction, her argument is waived. Moreover, her failure to take exception makes the instruction the law of the case even if added elements are present. *State v. Guzman*, 98 Wn. App. 638, 990 P.2d 464 (2000). Nevertheless, even with the given jury instruction, the jury still had to find a touching or striking would offend an ordinary person; therefore, no prejudice is shown. Finally, any error is harmless.

This court reviews a jury instruction that omits or misstates an element of the crime under a harmless error analysis. *State v. Banks*, 149 Wn.2d 38, 43, 65 P.3d 1198 (2003). "An error is not harmless beyond a reasonable doubt where there is a reasonable probability that the outcome of the trial would have been different had the error not occurred." *Banks*, 149 Wn.2d at 44 (quoting *State v. Powell*, 126 Wn.2d 244, 267, 893 P.2d 615 (1995)). There is no such reasonable probability here. A moving vehicle has great potential to inflict injury. Ms. Covey was clearly frightened and distraught by being struck with Mr. Walker's car. This evidence was uncontroverted at trial and supports the finding that Mr. Walker striking Ms. Covey with his car was a harmful and offensive contact. As such, there is no reasonable probability that the jury would have come to a different result had it been properly instructed as to the charge of assault.

E. Misconduct

The issue is whether Ms. Germany was denied a fair trial based on prosecutorial misconduct. Ms. Germany contends the prosecutor elicited barred testimony regarding her sexual orientation and drug activities, improperly argued a vehicle is a deadly weapon per se, and suggested she failed to produce a missing witness.

Ms. Germany's improper closing argument claims concerning the vehicle as a deadly weapon per se and her drug use are "waived by failure to make an adequate timely objection and request a curative instruction." *State v. Swan*, 114 Wn.2d 613, 661, 790 P.2d 610 (1990). Prosecutorial misconduct claims may be raised for the first time on appeal if the alleged misconduct is so "flagrant and ill-intentioned, and the prejudice resulting therefrom so marked and enduring that corrective instructions or admonitions could not neutralize its effect." *Id.* The defendant bears the burden of proof to show this prejudicial effect. *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997). To show such prejudice "the defense must demonstrate there is a substantial likelihood the misconduct affected the jury's verdict." *Id.* A party "may not remain silent, speculating upon a favorable verdict, and then, when it is adverse, use the claimed misconduct as a life preserver on a motion for new trial or on appeal." *Jones v. Hogan*, 56 Wn.2d 23, 27, 351 P.2d 153 (1960). Ms. Germany fails to meet her burden.

Considering the inferences from the circumstances, the prosecutor's deadly

weapon argument was proper. "Deadly weapon includes a vehicle, . . . which under the circumstances in which it is used, attempted to be used, or threatened to be used, is readily capable of causing death or substantial bodily injury." CP at 79 (Jury Instruction No. 13). We assume the jury followed the court's instructions. *State v. Lord*, 117 Wn.2d 829, 861, 822 P.2d 177 (1991). The prosecutor focused on the circumstances.

Moreover, evidence of Ms. Germany's drug activities was elicited by her trial counsel on cross-examination of a State's witness. This does not support prosecutorial misconduct. Even so, the trial court granted limited permission to both sides to develop evidence of drug use, concluding allegations of drug use by both sides existed, so "a little of that is going to probably come in." TRP Vol. I at 1. We turn now to the two remaining misconduct allegations.

First, regarding a possible reference to Ms. Germany's sexual orientation, defense counsel objected to mention that Ms. Germany was Ms. VanKnowe's girlfriend. The court sustained the objection and provided the correction "friend." This cured any improper testimony. Considering the vague reference to "girlfriend," Ms. Germany may have been more prejudiced if the court provided a more elaborate curative instruction.

Second, regarding the remarks about a missing witness, the trial court overruled defense counsel's objection, pointing out whether a witness was in the courtroom or not, defense counsel chose not to call that witness. A trial court's ruling on a claim of prosecutorial misconduct is reviewed under an abuse of discretion standard. *State v.*

Finch, 137 Wn.2d 792, 839, 975 P.2d 967 (1999). The defendant bears the burden of establishing misconduct, and that the conduct was prejudicial. *Id.* A new trial is not required unless a substantial likelihood exists of the improper argument affecting the verdict. *Id*. The trial court gave a tenable reason for its ruling.

Generally, a prosecutor may not comment on the lack of defense evidence because the defendant has no duty to present evidence. *State v. Cleveland*, 58 Wn. App. 634, 647, 794 P.2d 546 (1990). However, the prosecutor may comment on a defense failure to call a logically favorable witness, allowing the jury to draw an inference that the testimony was excluded because it would be unfavorable to the defendant. *State v. Blair*, 117 Wn.2d 479, 485-86, 816 P.2d 718 (1991). Considering this record, Ms. Germany's sister could well be considered logically favorable to her. Further, defense counsel blunted the negative impact by explaining, "she got here late." TRP Vol. IV at 187. Given all, Ms. Germany has failed to show the trial court abused its discretion when ruling on the prosecutor's missing-witness argument.

In sum, Ms. Germany was not denied a fair trial based on prosecutorial misconduct.

Affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

_____

Brown, J.

WE CONCUR:

_____
Schultheis, A.C.J.

_____
Kulik, J.